3. Criminal Law (§ 945 (1)*)—Newly Discovered Evidence Authorizing New Trial.—The newly discovered evidence must be such as would probably produce a different result on the merits.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 447.]

4. Criminal Law (§ 938 (1)*)—Cumulative Evidence Authorizing New Trial.—If the court can see that a different result on the merits ought or probably would be reached if the evidence is received, the evidence may furnish ground for a new trial, even though it is merely cumulative.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 447]

5. Criminal Law (§ 938 (1)*)—Newly Discovered Evidence Authorizing New Trial.—Where, in the light of the after-discovered evidence, gave doubt is entertained as to the correctness of the verdict, and it seems probable that if the newly discovered evidence had been before the jury a different result would have been reached on the merits, the verdict should be set aside.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 447.]

6. Criminal Law (§ 211 (2)*)—Affidavit Signed in Blank Does Not Authorize Warrant of Arrest.—Instruments signed by prohibition officer, but not sworn to by him and left blank as to the offense, were in no sense affidavits, and justice had no right to issue a warrant based on such papers.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 655.]

Error to Circuit Court, Augusta County.

James N. Johnson was convicted of transporting intoxicating liquor in violation of the prohibition law. His motion for new trial, on the ground of after-discovered evidence was overruled, and he brings error. Reversed.

L. Travis White, Timberlake & Nelson, and *Curry & Curry,* all of Staunton, for plaintiff in error.

The Attorney General for the Commonwealth.

McCLUNG *v.* FOLKS.

Nov. 20, 1919.

[101 S. E. 345.]

1. New Trial (§ 167*)—Diligence Affecting Equitable Action for New Trial.—Where it was to plaintiff's interest to have discovered a survey not included within plaintiff's or defendant's chain of the title to establish a reason for certain attached markings on a tree other than that they marked defendant's survey, the usual search

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

of the clerk's records by means of reference to the indexes which ordinarily meets the tests of reasonable care and diligence of careful and capable lawyers is insufficient, and, where they failed to discover such survey from records of a county formerly including the land until after trial, sufficient diligence is not shown to warrant a new trial.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 475.]

2. New Trial (§ 167*)—Diligence Affecting Equitable Action for New Trial for Newly Discovered Evidence.—Where, in a trial, the importance of the discovery of a survey not in the chain of title of either the plaintiff or defendant was known to plaintiff for at least a year before final trial, and the evidence shows that it could have been discovered by the exercise of diligence reasonably commensurate with that required, plaintiff is not entitled to a new trial for the discovery of such evidence.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 475.]

3. Judgment (§ 444*)—Equitable Relief against Judgment Based upon Perjured Testimony.—A court of equity will not grant relief against the enforcement of a law judgment on account of perjured testimony in the trial, unless it appears that without such testimony the result ought to have been different and that the fact of its falsity could not have been discovered by the exercise of proper diligence on the part of the complaining party.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 475]

Error to Circuit Court, Highland County.

Suit by Lewis McClung against C. C. Folks to enjoin the enforcement of a judgment. From a decree dismissing the bill after sustaining demurrer thereto, the plaintiff brings error. Affirmed.

Rudolph Bumgardner, of Staunton, and *John M. Colaw,* of Monterey, for plaintiff in error.

Timberlake & Nelson and *Curry & Curry,* all of Staunton, and *Andrew L. Jones,* of Monterey, for defendant in error.

SCHOOL BOARD OF CITY OF HARRISONBURG *v.* ALEXANDER.

Nov. 20, 1919.

[101 S. E. 349.]

1. Time (§ 9 (8)*)—Excluding Last Day in Computing Time for Appeal.—Where petition for writ of error is presented on same day of same month as that on which judgment was awarded during preceding year, the writ will be dismissed, the petition, under Code

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.